Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

MATTHEW BYRON WRIGHT,

Petitioner,

vs.

WILLIE DAIGLE, Superintendent,
Washington State Reformatory,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LEÑELL NUSSBAUM
Attorney of Record for Petitioner
Market Place Two, Suite 200
2001 Western Ave.
Seattle, Washington 98121
206/728-0996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did *Delaware v. Van Arsdall* reduce the Confrontation Clause guarantee of cross-examination of an essential state's witness, enunciated in *Davis v. Alaska*, to be a matter of discretion?

2. Does the Confrontation Clause require that a defendant in a criminal case be allowed to impeach the credibility of the essential prosecution witness by cross-examination directed at possible bias deriving from the witness':

(1) attempt to invoke his Fifth Amendment privilege to avoid testifying;

(2) his requests for immunity, which were denied;

(3) his declarations filed with the court asserting even while testifying that he was not waiving his Fifth Amendment privilege;

(4) pressures the police and prosecutor had applied to him between his initial statement and the trial, including arrest when he appeared not to be assisting them;

(5) the court jailing him for contempt and threatening his lawyers with contempt for invoking the privilege;

(6) other criminal activity the prosecution knew of, for which the witness could be prosecuted;

QUESTIONS PRESENTED – Continued

(7) assaults against his own girlfriend, whose versions of events changed to match his, and who also testified;

(8) assaultive behavior against the murder victim equivalent to that admitted against the defendant; or

(9) any evidence that supported a suspicion of the witness as the murderer;

when, without this information, the state was left to convey a fundamentally false impression that the witness was testifying against his best friend solely because his moral conscience got the better of him?

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PETITION FOR CERTIORARI

Matthew Byron Wright respectfully prays this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, as it has decided an important federal question in a way that conflicts with decisions of this Court: *Davis v. Alaska*, *Olden v. Kentucky*, *Delaware v. Van Arsdall*. Rule 10(c).

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals,[1] affirmed the Order Denying § 2254 Petition of the United States District Court.[2] The Washington Supreme Court denied review[3] of the opinion of the Washington Court of Appeals,[4] which affirmed the trial court's judgment and sentence.[5] The United States Court of Appeals denied rehearing or rehearing en banc.[6]

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[1] Appendix A: Memorandum, *Wright v. Daigle*, No. 01-35227 (9th Cir., Dec. 7, 2001).

[2] Appendix C: Order Denying § 2254 Petition, *Wright v. Daigle*, No. C99-1400Z (W.D. Wash., Dec. 5, 2000).

[3] Appendix E: Order Denying Review, *State v. Wright*, No. 65669-0 (Wash., Sept. 2, 1998).

[4] Appendix F: Order Modifying Opinion, *State v. Wright*, No. 34263-1-I (Wash. App., Feb. 27, 1998); and Appendix G: Opinion, *State v. Wright*, No. 34263-1-I (Wash. App., Aug. 25, 1997).

[5] Appendix H: Judgment & Sentence, *State v. Wright*, No. 93-1-03427-6 (King County, Wash. Superior Ct., Mar. 11, 1994).

[6] Appendix I: Order Denying Petition for Rehearing and Rehearing En Banc, *Wright v. Daigle*, No. 01-35227 (9th Cir., Jan. 24, 2002).

JURISDICTION

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Court of Appeals Order denying rehearing or rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1). The federal court originally had jurisdiction under 28 U.S.C. § 2254.

STATUTES INVOLVED IN THIS CASE

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

United States Constitution, Amend. VI.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

United States Constitution, Amend. XIV, Sec. 1.

STATEMENT OF THE CASE

Matt Wright is a prisoner at the Washington State Reformatory in Monroe, Washington, serving a sentence of 494 months.

A. TRIAL PROCEEDINGS

1. Murder and Investigation

Sixteen-year-old Audra Letnes was found murdered in a park one May morning. She died of strangulation,

stabbing, and bludgeoning with a piece of concrete. The police began with two suspects: Matthew Wright and B.J. Reynolds, both 19.

Police searched Wright's home that evening, interviewed him, his mother and sisters. Wright cooperated. The police seized a number of items from his home. No physical evidence connected him to the murder.

Police arrested Reynolds on outstanding misdemeanor warrants. He said Wright had called him the morning Audra was found and asked him to pick him up at his mother's home. Reynolds' girlfriend drove him over to pick up Wright, then they went back to Reynolds' apartment. Reynolds said he knew nothing at all about Audra's murder. The police let him remain in jail. They called his girlfriend, who confirmed what he had said. She also said Reynolds had no time alone with Wright, and he told her he knew nothing about Audra's killing.

The next day, police again interviewed Reynolds. They persuaded him that Wright was accusing Reynolds of killing Audra. They let him call his girlfriend again, and his father. Then Reynolds told the police Wright had confessed to him that he'd killed Audra. When police called this time, the girlfriend again corroborated Reynolds' statement – this time the new version: he was alone with Wright back at the apartment, and Reynolds had told her that Wright strangled Audra.

The police arrested Matt Wright for murder. They released B.J. Reynolds, although his warrants remained outstanding.

The police maintained regular contact with Reynolds over the ensuing months. When they were not happy with his level of cooperation, they arrested him again on the outstanding warrants. When pressured by the police, Reynolds would provide more "details" of what Wright supposedly had told him. Nonetheless, no physical evidence tied Matt Wright to Audra's murder.

2. Pretrial Proceedings

The state conceded, and the trial court held, the prosecution could not proceed without Reynolds' testimony implicating Wright.

Called to testify before trial, on advice of counsel Reynolds invoked his Fifth Amendment privilege. The state offered immunity only for false reporting, a misdemeanor; it refused to grant him immunity for the murder or for other criminal behavior he had engaged in. The trial court concluded Reynolds did not have a valid basis for invoking the privilege. It ordered him held in contempt. On the prosecutor's motion, it also set a hearing to consider whether to hold Reynolds' lawyers in contempt for advising him to invoke the privilege.

Under the contempt order, Reynolds would be held in 23-hour lockdown in the county jail, instead of the minimum security campus-like facility where he had been held on his misdemeanor warrants. Through the jail guard, he asked the court how he could purge the contempt. The court appointed him a new lawyer.

The new lawyer moved to reconsider the contempt order, again advising his client he had a privilege against self-incrimination. The court declined to reconsider.

Before testimony was taken at trial, the prosecutor moved and the court ordered that there could be no cross-examination of Reynolds regarding his other pending criminal charges and activity. Reynolds agreed to testify in court, but at the same time filed a Declaration with the court:[7] he claimed he was not waiving his Fifth Amendment privilege by testifying; he was testifying solely on the understanding that the court would not permit cross-examination regarding his other criminal behavior, including violent and assaultive behavior against his girlfriend and against Audra, illegal use of controlled substances, and a potential hit and run charge. With this Declaration on file, Reynolds testified at pretrial hearings.

At the time of trial in December, Reynolds filed a Supplemental Declaration,[8] again stating he did not waive his Fifth Amendment privilege by testifying, and again reasserting his understanding of the court's limitations on cross-examination.

3. Trial Court's Prohibition of Cross-Examination

The trial court not only prohibited cross-examination of Reynolds regarding his own criminal behavior and pending charges. It also prohibited the defense from

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[7] Appendix J.

[8] Appendix K.

cross-examining him regarding: his prior and continuing assertion of his Fifth Amendment privilege;[9] his requests for immunity; the fact he was held in contempt and his lawyers threatened with contempt; the threat of 23-hour lockdown; any of his drug or alcohol use or treatment; any acts of violence against his girlfriend or Audra; his history of failing to appear for court hearings; any pending criminal matters; any criminal activity with other witnesses; or any other evidence that might connect Reynolds to this murder.

4. Defense Theory

It was the defense theory that the police "tricked" Reynolds in May into making up the story that Matt Wright confessed to him, to avoid himself being investigated and prosecuted for Audra's murder when he thought Wright was accusing him. After he realized the trick and tried to correct it, the police and prosecution continued applying pressure that didn't permit him to correct his falsehood. If he suggested he would not testify, the court would hold him in indefinite 23-hour lockdown for contempt. If he testified without implicating Wright, the state would have him in jail for other criminal

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[9] It relied on state case law that no party may admit evidence that an individual has asserted the Fifth Amendment privilege. *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated in part on other gr'ds*, 408 U.S. 934 (1972), *overruled on other gr'ds in State v. Gosby*, 85 Wn.2d 758, 539 P.2d 80 (1975). *But see Ohio v. Reiner*, 532 U.S. 17 (2001) (not constitutional error to permit state's witness to testify that she had asserted privilege until provided immunity; defendant permitted to cross-examine on that issue).

activity, and possibly prosecute him for Audra's murder as well.

The defense intended to explore Reynolds' behavior and fears of prosecution, for this murder and other criminal behavior, only so far as necessary to probe his bias and prejudice in his trial testimony. But that required presenting the reasons Reynolds feared prosecution and the facts that made that fear reasonable. The initial lie may have been to get out of jail after a couple of days. But the state had a continuing hold on Reynolds through the time of trial. The defense wished to demonstrate for the jury what this hold was and what power it had over Reynolds, to explain why he could not correct his story now.

5. Direct Examination

Reynolds testified he didn't want to testify against Wright, his best friend whom he "loved like a brother." Reynolds said he lied in his first statement and left details out of his second statement, because he "thought [he] was helping Matt." When the prosecutor asked him if he regretted giving the second statement, the court overruled a defense objection, allowing the question as it went to the witness' bias. He said he felt like he was a suspect when he spoke with Det. Petersen back in May.

He acknowledged two juvenile convictions for theft and burglary, immunity for false reporting, and dismissal of a misdemeanor harassment charge for a threatening phone call to Audra.

Q Was it difficult for you to give a second statement to Detective Petersen?

A Yes.

Q Have you regretted having said anything?

A Yeah.

. . .

Q How do you feel about the defendant today?

MR. CONNICK: Objection as to relevance.

MR. MIYAKE: Goes to bias, Your Honor.

THE COURT: Yes, it does, overruled.

A I still love Matthew as my friend and as my brother, but I had to make a decision between my family and him.

Q How do you feel about having to testify against him?

A I don't want to.

6. Cross-Examination

Defense counsel was permitted to repeat much of what Reynolds had admitted on direct. But when he asked B.J. whether he'd been assured he would not be prosecuted for this crime, he responded, "Not correct." The state's objection was sustained. When asked if he understood he would not be prosecuted for this crime, he responded, "Right." The prosecutor's objection as "mischaracterization" was sustained. The court sustained an objection when counsel asked about forensic tests of hair samples with Reynolds' hair, tests that had excluded Wright.

Defense counsel cross-examined Reynolds in part as follows:

Q Okay. You're hoping by both the statement you gave to Detective Petersen **and your testimony today**, there will be no prosecution of you for this crime, correct?

MR. MIYAKE: Objection.

THE COURT: Sustained.

MR. MIYAKE: Move that it be stricken.

THE COURT: It will be stricken.

Matt Wright testified he did not kill Audra. He had nothing to do, in any way, shape or form, with her death.

7. Prosecution's Closing Argument

The prosecutor argued that B.J. "found himself in a moral dilemma. But fortunately, he had a conscience and did the right thing" by testifying against his friend. In closing he said:

> B.J. is no stranger in the criminal justice system as was pointed out by the defense. **Do you think a couple days in jail is going to force him to turn on his best friend?** And even if he was initially scared and said, oh, it was my best friend, **he could've come into court and said, told you, no, it wasn't him.**

(Emphases added).

The defense had no evidence from which to respond that it was not "a couple of days in jail" that made Reynolds testify as he did, or to explain why Reynolds could not come into court now and tell the jury no, it wasn't Wright.

B. APPELLATE PROCEEDINGS IN STATE COURT

The Washington Court of Appeals issued an unpublished opinion. It referred to the assignments of error as claims of "various procedural and evidentiary rulings" subject to an "abuse of discretion" standard. It rejected any confrontation claim. App. G. Upon reconsideration, it inserted into a footnote a reference to "the confrontation clause." It made no change to the text of its opinion. App. F.

The Washington Supreme Court denied review without further comment. App. E.

C. PROCEEDINGS IN FEDERAL COURT

The District Court denied the Petition for habeas. It held the only aspect of the confrontation claim "properly exhausted" was limiting cross-examination of Reynolds regarding his Fifth Amendment privilege. Nonetheless, it concluded "there is no clearly established Supreme Court precedent" "that clearly states that a criminal defendant should be allowed to cross-examine a witness against him regarding prior invocation of his or her Fifth Amendment rights." The court could not "break new ground" to grant relief. Otherwise, it held that the questions permitted on cross-examination were sufficient. App. D, E.

The Court of Appeals held that Wright had properly exhausted all state remedies on his claim of his right to confront B.J. Reynolds on all topics. App. A-2 n.1. Nonetheless, it held the judge's preclusion of cross-examination "did not curtail Petitioner's confrontation rights unconstitutionally," citing *Delaware v. Van Arsdall*. App.

A. The Court denied rehearing or rehearing en banc. App. I.

REASON FOR GRANTING THE WRIT

The United States Court of Appeals Has Decided an Important Federal Question in a Way that Conflicts with *Davis v. Alaska*, *Olden v. Kentucky*, and Diminishes the Guarantees of the Confrontation Clause.

The Confrontation Clause Guarantees the Right to Expose in Cross-Examination the Facts and Reasons Behind a Witness' Apparent Motive and Bias, the Extent of the Bias, and Not Merely the Conclusion that There May Be Bias.

As in *Davis v. Alaska*, 415 U.S. 308, 315 (1973), "the essential question turns on the correctness of the [lower] court's evaluation of the 'adequacy' of the scope of cross-examination permitted." As here, the lower court in *Davis* held

> our reading of the trial transcript convinces us that counsel for the defendant was able **adequately** to question the youth in considerable detail concerning the possibility of bias or motive.

Id. at 314-15 (emphasis added). This Court disagreed.

In *Davis*, the state's essential witness Green was on probation for a juvenile offense when he implicated the defendant in a burglary. The court ruled the defense could not reveal that Green was on probation. Although the defense was able to get him to admit that it had "crossed his mind that the police might have thought he had something to do with the crime," he denied being

"really" worried about that and denied ever having been questioned before by police. *Id.* at 312-13.

This Court held that such "indirect references" to a possibility of bias were inadequate to meet the Sixth Amendment's right of confrontation.

> In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." . . . **"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" [and] . . . "to submit [it] to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.' "**

Lilly v. Virginia, 527 U.S. 116, 123-24 (1999) (citations omitted; emphasis added).

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby **"to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."**

Olden v. Kentucky, 488 U.S. 227, 231 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (emphasis added). Although a trial court may properly limit "cross-examination based on concerns about, among other things,

harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *id.*, 475 U.S. at 679, the Confrontation Clause guarantees the right to present the jury with the **facts** that underlie the inferences of bias. Only with those facts will a jury understand not merely that a bias may exist, but why and to what extent that bias may exist.

> One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony.". . . **We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.**

Davis v. Alaska, 415 U.S. at 315-17 (emphasis added), citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

This case is materially indistinguishable from *Davis v. Alaska*. In *Davis*, the defendant was charged with stealing a safe from a business. The state's case relied primarily on the testimony of a juvenile, Richard Green. The safe was found near his home. He claimed he saw and spoke with two Negro men with a car near where the safe was later discovered. Taken to the police station, Green identified the defendant from a photo montage.

At the beginning of trial, the state moved to prevent any reference to Green's juvenile conviction record and the fact he was on probation for burglarizing two cabins. The defense explained this evidence was relevant to Green's credibility:

> From this petitioner would seek to show – or at least argue – that Green acted out of fear or concern of **possible jeopardy to his probation**. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but **Green might have been subject to undue pressure from the police** and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

Davis, 415 U.S. at 311 (emphases added). The trial court prohibited inquiry. Although prevented from revealing that Green had been on probation, counsel did question Green about his state of mind at the time he learned a stolen safe had been discovered near his home. Green admitted it "had crossed his mind" that the police might have thought he had something to do with the crime.

The state court affirmed, concluding "counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive." This Court reversed.

> The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of **so vital a constitutional right as the effective cross-examination**

> **for bias of an adverse witness**. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

Davis, 415 U.S. at 320 (emphasis added).

The same result was reached in *Olden v. Kentucky, supra*. The state court was concerned that questions regarding the complaining witness' live-in relationship with another man would "prejudice the jury against her." That relationship, however, provided the reason she would falsely claim rape rather than admit to consensual sex with the defendant. The state court's concern for the witness could not overcome the defendant's right of confrontation, his right to ask her about these facts. *Id.*, 488 U.S. at 232.

The "adequacy" of cross-examination cannot be determined by a court thinking an accused has had several topics to explore, so there are some aspects that can be argued in closing argument. The Sixth Amendment guarantees the ability to cross-examine on all legitimate aspects of bias and motive to lie. If there are fifty different reasons not to believe what an essential witness is saying, the Constitution does not permit a court to say you may only inquire about five of them, and that will be enough to argue bias.

Delaware v. Van Arsdall, supra, did not reduce the scope of the Confrontation Clause. It concluded the trial

court had more discretion to limit lengthy cross-examination of a relatively minor witness. But Reynolds was not a minor witness; he was the essential witness.

In *Davis*, this Court particularly noted the false impression the state's witness was able to convey to the jury by not being subjected to cross-examination. In this case, an equivalent false impression was created and argued by the state: even if Reynolds was tricked into initially implicating his best friend, he wouldn't come in and tell the jury that unless it were true, compelled by his own moral conscience. The defense was utterly unable to respond.

The jury could not assess Reynolds' testimony unless it knew the facts of what pressures were being applied to Reynolds: he was not simply afraid the police might believe Wright's bald accusation against him back in May, but there were genuine facts and events that made it reasonable for the police to suspect Reynolds, and they continued to apply that pressure up to and during Wright's trial.[10] He was not trying to avoid merely "a couple of days in jail," but avoid multiple potential prosecutions, not the least of which was for this murder, as well as indefinite 23-hour lockdown for contempt. By testifying as he did, while still asserting his Fifth Amendment privilege, Reynolds believed he could have his cake and eat it, too.

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[10] "Cross-examination on the foreclosed topic may have presented the only concrete example of *the hold the government might still have* had over the witness." *United States v. Lynn*, 856 F.2d 430, 433 (1st Cir. 1988).

The defense was entitled to ask Reynolds about these factors, his fears and perceptions regarding how he could testify, what facts supported those fears and perceptions to make them reasonable, and what steps he had taken or attempted to protect himself.

The bare conclusion that Reynolds felt "forced" to testify did not begin to explain to the jury what level of pressure was being applied to him. Some people feel "forced" by moral compulsion, some by receipt of a summons or subpoena, some by being asked by a person in authority. Some people would not be able to lie to implicate their best friend unless they were threatened themselves with prosecution for murder, or with repeated use of force by police, prosecutors, and eventually a court, threatening an indefinite 23-hour lockdown. The jury was entitled to know what facts made Reynolds feel this "force."

The Court of Appeals opinion, and the lower courts, relied on the *Van Arsdall* recitation that limitations on cross-examination are within the trial court's discretion. This Court needs to reestablish the essence of the Confrontation Clause to permit the adversary process to do its job, and let an informed jury decide the case.

CONCLUSION

For the foregoing reasons, Petitioner Matthew Wright respectfully asks that this Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted this 23rd day of April, 2002.

LENELL NUSSBAUM

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW BYRON WRIGHT, Petitioner-Appellant, v. WILLIE DAIGLE, Superintendent, Washington State Reformatory, Respondent-Appellee.	No. 01-35227 D.C. No. CV-99-1400-Z MEMORANDUM* (Filed Dec. 7, 2001)

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted December 3, 2001
Seattle, Washington

Before: O'SCANNLAIN, GRABER, and McKEOWN, Circuit Judges.

Petitioner Matthew Byron Wright appeals the district court's denial of his § 2254 petition. On de novo review, we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

A. Confrontation Clause

Petitioner first argues that the limitations on his cross-examination of B.J. Reynolds rise to the level of an unreasonable application of clearly established federal law.[1] 28 U.S.C. § 2254(d)(1). We are not persuaded.

A trial judge may limit the scope of cross-examination without necessarily committing constitutional error. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Petitioner had ample opportunity to cross-examine Reynolds as to coercion, favorable treatment, bias, and motive to lie. This fact distinguishes Petitioner's case from those on which he principally relies, *Davis v. Alaska*, 415 U.S. 308 (1974), and *Van Arsdall*.

Specifically, Petitioner's cross-examination disclosed that Reynolds did not want to testify, that the police had coerced him to do so, that he gave his statement because he was concerned that the police otherwise would blame him for the murder, and that he received benefits such as immunity from prosecution for having given two different reports to police. Under these circumstances, the trial judge's decision to preclude additional cross-examination did not curtail Petitioner's confrontation rights unconstitutionally.

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[1] Although Respondent argues that these issues were not exhausted, we disagree, because the issues were presented to the Washington Supreme Court.

B. Due Process

Petitioner also argues that the prosecutor violated his right to due process by improperly coercing Reynolds' testimony. In support he cites *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Young*, 470 U.S. 1 (1985); and *Webb v. Texas*, 409 U.S. 95 (1972) (per curiam).

In *Berger*, the prosecutorial misconduct was pronounced and persistent and had a cumulative effect on the jury. By contrast, the alleged misconduct in this case was not so pronounced or persistent, and did not take place in front of the jury. *Young* cited *Berger* in ruling that a prosecutor's statements in response to defense counsel's closing argument did not constitute "plain error"; it provides no additional support for Petitioner's argument. In *Webb*, the trial judge threatened a defense witness to keep him off the stand. That is unlike what happened here, where the prosecutor's effort was to require a witness to testify on behalf of the state.

None of the cited cases is controlling. Indeed, Petitioner's argument recognizes that the principles of the Supreme Court's cases would have to be extended before they would cover the kind of pressure allegedly placed on Reynolds. Because it would require this court to " 'break[ ] new ground' " to hold in Petitioner's favor, he must be denied relief. *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of Washington

MATTHEW BYRON WRIGHT	JUDGMENT IN A CIVIL CASE
v.	
WILLIE DAIGLE	CASE NUMBER: C99-1400Z

(Filed Jan. 25, 2001)

[ ] **Jury Verdict.** This actions came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT

The Petition for Habeas Corpus (docket no. 1) is DENIED, and this action is DISMISSED with prejudice.

Judgment is hereby entered for respondent.

BRUCE RIFKIN, Clerk

By /s/ Casey Condon
Casey Condon
Deputy Clerk

January 25, 2001
Date

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MATTHEW BYRON WRIGHT, Petitioner, v. WILLIE DAIGLE, Superintendent, Washington State Reformatory, Respondent.	No. C99-1400Z ORDER (Filed Dec. 5, 2000)

This matter comes before the Court upon review of the Report and Recommendation of the Magistrate Judge (R&R), docket no. 41, Petitioner's Objections (Objections), docket no. 43, together with the records and files herein. The Court modifies in part and adopts in part the Report and Recommendation and enters the following order explaining its ruling.

A. Background.

Petitioner Matthew Wright (Wright) was convicted of stabbing, strangling, and crushing the skull of a sixteen year old girl. R&R at 2. He is in the custody of the Washington State Department of Corrections, serving a sentence of 494 months for first degree murder. *Id.* at 1.

1. Trial Court.

The chief witness against Wright at trial was his friend Brandon Reynolds (Reynolds), who testified that, on the morning following the murder, Wright had confessed to him. *Id.* at 2. Reynolds had also been a suspect in the murder. Petitioner's Memorandum in Support of 28 U.S.C. § 2254 Petition (Memo in Support), Docket No. 2, at 4. Reynolds attempted to assert his Fifth Amendment rights to avoid testifying, but was held (jailed) in contempt until he testified. R&R at 2.

Reynolds was the State's key witness, without whom, the trial court found, the State could not proceed with this charge. Memo in Support at 7, *citing* Verbatim Report of Proceedings (RP) [10/25] 13; RP [11/4] 36-37 (both included in Petitioner's Submission of Additional Portions of State Court Record, docket no. 48). Besides Reynolds' testimony, all of the evidence against Wright was circumstantial. Memo in Support at 7, citing RP [9/22] 4-6; RP [10/12] 1-5; RP [10/18] 18. Responding to motions in limine, the trial judge excluded the following subject matter from Wright's cross-examination of Reynolds: 1) Reynold's invocation of his Fifth Amendment rights, along with mention of the fact that he was held in contempt and asked for immunity; 2) the fact that Reynolds was compelled, by the court, to testify; 3) Reynold's custody status; 4) any prior acts of violence by Reynolds against the victim or others.[1] RP [12/13], docket no. 11, exh. 8, at 24-26, 30. Threats made by Reynolds

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[1] A number of other areas of inquiry were barred during cross-examination but are not pertinent to this Order.

against the victim were admissible for the limited purpose of showing Reynolds may have feared being a suspect, but any reference to a specific instance when Reynolds hung the victim by her ankles from a balcony was excluded. *Id.* at 39-40.

In his Objection to the R&R, Wright gives a more elaborate version of the facts than is provided in the R&R, in which he underscores an alleged pattern of coercion and rewards by the prosecutor in obtaining the testimony of Reynolds. Petitioner's Objection to Report and Recommendation, Docket No. 43, at 9-11, citing his Memorandum in Support of 28 U.S.C. §2254 Petition, Docket No. 2, at 2-25.

2. State Appeals.

On direct appeal, Wright raised the issue that his right to confrontation had been violated by numerous restrictions placed on cross-examination, by the fact that he was not permitted to present extrinsic evidence of witness bias, and by the admission of hearsay evidence. R&R at 2; Objection at 11-12. He also raised issues of due process violation (in that Reynolds had been compelled to testify) and prosecutorial misconduct, and argued that the facts did not support an exceptional sentence. *Id.* His conviction was affirmed. R&R at 2.

On appeal to the Supreme Court of Washington, Wright raised ten specific issues, including violation of his right of confrontation, due process violation and admission of hearsay evidence. Petition for Review, Docket No. 11, Ex. 27, at 1-3. His petition for review was denied. R&R at 3.

3. Asserted Grounds.

Wright has advanced three grounds for habeas corpus relief: 1) violation of his right to confrontation by limiting cross-examination of crucial state witnesses; 2) violation of his right to present a defense in prohibiting evidence and argument regarding pressures put on Reynolds and the fact that Reynolds was a suspect; and 3) violation of his right to confrontation by admission of hearsay evidence. Petition Under 28 U.S.C §2254 For Writ of Habeas Corpus, Docket No. 1, at 5-6. Wright also complained about limits on cross-examination of additional witnesses under his first ground (right of confrontation), but because of then-existing case law the Magistrate Judge did not consider these claims (see below). R&R at 7, n. 1.

B. Exhaustion.

1. Legal Standard.

This Court may not grant a writ of habeas corpus unless the petitioner "has exhausted the remedies available in the courts of the State." 28 U.S.C. 2254(b)(1)(A). The exhaustion requirement is satisfied once the federal claim has been fairly presented to the State's courts, and they have had a full opportunity to remedy any constitutional violation. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). The petitioner must have presented the same claim to the State courts that he now makes to the federal courts. *Id.* at 275-76. This means that the State court must be alerted that the petitioner is making claims under the United States Constitution.

Duncan v. Henry, 513 U.S. 364, 365-366, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). If a petition for writ of habeas corpus includes some claims that have been exhausted, and some that have not, the whole petition must be dismissed and the petitioner must either pursue the remaining claims to exhaustion or amend to include only exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 510, 102 S.Ct,. 1198, 71 L.Ed.2d 379 (1982).

To properly present a claim to the State, Wright must have complied with Washington court rules. Washington Rule of Appellate Procedure (RAP) 13.7 limits the supreme court's scope of review to those "questions raised" in the petition for review. RAP 13.7(b). The petition must also contain "a concise statement of the issues presented for review," a "statement of the [relevant] facts and procedures," and "a direct and concise statement of the reason review should be accepted." RAP 13.4(c)(5)-(7). A brief should also contain "the argument in support of the issues presented for review" with citations. RAP 10.3(5). This argument must be "adequate" and "cogent." *Schmidt v. Cornerstone Invest., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) (constitutional claims not examined because cases cited in argument did not support their specific constitutional challenge); *see also Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (court declined to review Consumer Protection Act issues because petitioner failed to make a CPA argument, or even mention the Act by name).

The Washington Supreme Court has held that arguments included "solely" by reference need not be addressed by that court. *State v. Brett*, 126 Wn.2d 136, 205, 892 P.2d 29 (1995). In that case the court did not, however,

state how much argument on an issue would be necessary, coupled with materials incorporated by reference, to fulfill the requirements of this rule.

2. Exhaustion as to Issue 1 – Right of Confrontation on Cross-examination.

The State has conceded in its Answer that Wright properly exhausted this ground as it pertained to cross-examination of Reynolds concerning his pre-trial assertion of the Fifth Amendment. Respondent's Answer, docket no. 10, at 7. This Court's review of the PFR shows this to be correct with the specific areas properly presented including Wright's ability to cross-examine Reynolds regarding a) Reynold's invocation of his Fifth Amendment privilege, b) the "process" by which the trial court "compelled" Reynolds' testimony, c) Reynolds' current custody status, and d) the continuing nature of Reynolds' bench warrants. *See* PFR at 1-2 (issues), 4-7 (relevant facts), and 7-8 (legal arguments). The R&R found this issue to be exhausted, and that finding is adopted. The merits of these claims will be examined below.

Wright also makes a brief mention of the fact he was prevented from cross-examining Reynolds regarding the witness' prior acts of violence against women in general and the victim in particular. PRF at 13-14. However, this was presented to the State court in a later section that focuses on the trial court's decision to admit evidence of Wright's past actions. *Id.* This section does not raise any federal constitutional question, nor does it develop a

legal argument with citations regarding Reynold's testimony. *Id.* The Court finds this issue was not properly exhausted, and adopts the R&R as to this issue.

Finally, Wright's PFR mentions, in a brief section and a footnote, that the "same errors were made regarding the cross-examination of [witness] Chris McGonagle," referring the court to his Appellate Brief at 73-74, and his Motion for Reconsideration at 10-12. PRF at 8, n.2; 11. A review of the cited pages of Wright's Appellate Brief shows that the specific facts and legal issues were not the same. In his PFR Wright did not present facts or legal arguments regarding limits on his cross examination of McGonagle, therefore these arguments are included, if at all, solely by reference. The Magistrate Judge did not consider this argument because the bulk of any argument was necessarily incorporated by reference. R&R at 7, n.1. Under the law of Washington State the issue was not properly exhausted.[2] *See State v. Brett, supra.* The R&R's findings as to witness McGonagle are adopted, as that issue was unexhausted.

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[2] Considerable briefing has been submitted concerning whether materials incorporated by reference in a petition for review to the Washington Supreme Court are properly exhausted. Because the Court finds the issue was included solely by reference, and State precedent controls in that situation, it does not reach on the issue of when and to what extent incorporation by reference might be permissible.

3. Exhaustion as to Issue 2 – Denial of Due Process.

The eighth issue in Wright's "Issues Presented for Review" section concisely alerted the State Supreme Court to the issue now at hand.[3] PFR at 3. Many of the same facts that are relevant to the "right of confrontation" argument section are relevant to this second issue, i.e., those that highlight the alleged "pressures" put on Reynolds or that show that he had a reason to tell a story in a particular way. Thus Wright's PFR adequately presents the relevant facts. *See* PFR at 4-7. In the relevant argument section, Wright asserts that the pressures placed on Reynolds to testify "violate[d] due process, and present . . . a constitutional issue of first impression." PFR at 17. Wright then refers the court to RAP 13(b)(4), which indicates a federal constitutional question. *Id.* He goes on to assert that the continued pressures "not merely to testify, but to testify in a certain manner," subverted the court's quest for truth and violated due process. *Id.* to elaborate on the facts and inconsistent statements underlying this assertion, he refers the court to the court of appeals slip opinion and his appellate brief. *Id.* He than refers to the Fifth and Fourteenth Amendments. *Id.*

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[3] That section stated: "where the state's key witness was under unparalleled pressure from the state, and ultimately from the trial court, to provide certain testimony, despite conflicting versions of events in his various statements, has the truth-finding process been so subverted as to deny the defendant due process?" PFR at 3.

Wright met the State and Federal requirements for exhaustion on this issue, and therefore his claim regarding denial of due process was properly exhausted. The R&R is modified in that this Court will review this claim on its merits.

4. Exhaustion as to Issue Three – Hearsay Evidence.

The Magistrate Judge determined that the third issue was not exhausted because Wright "failed to specifically identify the hearsay evidence that was being challenged and did not present it as a violation of federal law." *Id., citing* PFR at 15-16. The Court finds that this is correct and adopts the Magistrate Judge's R&R as to this issue.

C. Merits of the Exhausted Claims.

1. Legal Standard for Habeas Relief.

A writ of habeas corpus can issue only if the State court's decision was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Habeas relief may not be granted on grounds that would constitute a "new rule" of constitutional law, that is, the habeas court may not enforce a rule that "breaks new ground," imposes a new obligation on the state or federal government, or was not dictated by precedent existing at the time the petitioner's conviction became final. *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), citing *Teague v. Lane*, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334

(1989). If "reasonable jurists hearing the petitioner's claim at the time the conviction became final would have felt compelled by existing precedent to rule in [the petitioner's] favor," relief is proper. *Graham*, 506 U.S. 467, citation and internal quotations omitted.

2. Merits of Issue 1 – Right of Confrontation on Cross-Examination.

a. General standard.

A defendant's right to cross-examine witnesses is protected by the Sixth Amendment of the United States Constitution, and is protected in State proceedings, by the Fourteenth Amendment, under *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Although extrinsic evidence may not be admitted to reflect upon a witness' character for truthfulness (under both Fed. R. Evidence 608(b) and Washington's ER 608(b)), it is acceptable to show a witness' bias. *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (evidence of witness' affiliation with prison gang admissible to show bias and motive to lie); *State v. McDaniel*, 83 Wn.App. 179, 920 P.2d 1218 (1996) (evidence of witness' status on probation admissible to show bias and motive to lie).

b. Reynold's invocation of the Fifth Amendment.

Petitioner's briefing does not reveal a case that clearly states that a criminal defendant should be allowed to cross-examine a witness against him regarding prior invocation of his or her Fifth Amendment rights. During

oral argument, both parties stated that they were unaware of such a case, and this Court's research has not revealed one. Because there is no clearly established Supreme Court precedent on this question, the Court would have to break new ground to grant relief on this issue, something the Court is prohibited from doing under the rule of *Graham* and *Teague*. The Court finds that Wright must be denied relief on this ground.

c. The fact that Reynold's testimony was compelled.

The fact that the trial court held Reynolds in contempt and compelled him to testify is completely consumed by the discussion of Reynolds' Fifth Amendment assertion, § C(2)(b) *supra*. For the same reasons as are stated there, Reynolds [sic] cannot be granted relief on this ground.

Regarding "compulsion" by the prosecutor, Wright was allowed to question both Reynolds and a detective regarding Reynolds' outstanding warrants and the fact that he was not arrested on them while he "cooperated" with detectives. RP [12/13], docket no. 11, exh. 8 at 123-124. Indeed, the trial court explicitly permitted defense counsel to argue that Reynolds was being coerced and pressured into making his statement and testifying. RP [12/13] 38. Wright was able to make arguments to show any "compulsion" by police and prosecutors, and must therefore be denied relief on this ground.

d. Barring questions regarding Reynolds' custody status.

There is well and long-established Supreme Court case law holding that a criminal defendant has the right, upon cross-examination, to ask questions intending to show that the witness against him is currently incarcerated, even if the incarceration is unrelated to the matter at hand. *See Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931) (reversing conviction where trial court cut off, in limine, all inquiry into witness' custody status). However, this rule is inapplicable to the case at hand.

At pretrial hearing, the trial court heard arguments concerning a motion in limine made by the State to exclude evidence of Reynolds' current custody status. RP [10/21] at 92, included in Petitioner's Submission of Additional Portions of State Court Record, docket no. 48. In that argument, Wright's trial counsel specifically stated that he did not plan to ask Reynolds whether he was currently in jail, rather he wanted to ask whether Reynolds was testifying under threat of being put in jail.[4] *Id.* The trial judge initially granted the motion, then decided to withhold judgment after the State argued that to allow cross-examination regarding Reynolds being threatened with jail would bring in the Fifth Amendment invocation and all its intertwined issues. *Id.* at 92-97.

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[4] Wright's trial counsel specifically said " . . . I'm not going to ask him what he's in jail for or even if he's in jail. I'm not going to ask him – I'm going to ask him if he's under threat of jail." RP [10/21] at 92.

The trial court later granted the State's motion, after hearing Wright's counsel renew his objection, stating that he specifically wanted to cross-examine Reynolds regarding the fact he was moved from minimum security to 23 hour lockdown when he previously failed to testify. RP [12/13] at 24. It was certainly within the trial court's discretion to prohibit this line of testimony as another tentacle of Reynold's Fifth Amendment assertion. *See* § C(2)(b) *supra*. For the reasons set forth above, relief cannot be granted on this ground.[5]

e. Continuing nature of Reynold's bench warrants.

As was noted in § C(2)(c) above, Wright was allowed to inquire into the coercive pressures placed upon Reynolds by police and prosecutors, including the bench warrants in question. This claim is therefore without merit.

f. Conclusions.

The Magistrate Judge's finding that relief cannot be granted on petitioner's right to confrontation grounds is hereby adopted.

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[5] Had the Petitioner argued that he wished to ask Reynolds about his current custody in jail, the Court would be presented with quite a different problem.

3. Merits of Issue 2 – Violation of Due Process.

Wright argued to the State Supreme Court that the "unparalleled pressure from the state, and . . . trial court, to provide certain testimony . . . " subverted the truth-finding process in violation of Wright's due process rights. PFR at 3. However, as Wright admits in the topic sentence of his relevant PFR argument section, this "presents a constitutional issue of first impression for [the State Supreme Court] to review." PFR at 17. The petitioner presented no controlling Federal case law to the State Supreme Court, and has presented none to this Court.

As any finding of a due process violation due to accumulated pressures would be a "new rule," and improper for this Court to develop in a habeas proceeding, the Court denies the petitioner habeas relief on this ground.

D. Conclusions.

Of the issues presented for review, the Court finds that Wright did not properly exhaust his State remedies regarding Issue 1 (right of confrontation) as it applies to cross-examination of witness Chris McGonagle and of Reynolds regarding prior acts of violence against women in general and the victim in particular. Also unexhausted was Wright's issue 3, regarding admission of hearsay evidence. The R&R is adopted as to these claims.

The properly exhausted issues raised here were Issue 1 (right to confrontation) as to the cross-examination of Reynolds regarding a) Reynolds' prior invocation of his

Fifth Amendment rights, b) the fact Reynolds' testimony was compelled, c) barring questions regarding Reynolds' custody status, and d) the continuing nature of Reynolds' bench warrants. Also exhausted was Issue 2 (violation of due process rights). For the reasons stated above, the Court finds these claims are without merit. The Petition for Habeas Corpus (docket no. 1) is DENIED, and this action is DISMISSED with prejudice.

The Clerk is directed to enter judgment for respondent and to close this case, and to send copies of this Order to petitioner and to Judge Weinberg.

IT IS SO ORDERED.

DATED this 4th day of December, 2000.

/s/ Thomas S. Zilly
THOMAS S. ZILLY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MATTHEW BYRON WRIGHT, Petitioner, v. WILLIE DAIGLE, Respondent.	CASE NO. C99-1400Z REPORT AND RECOMMENDATION

I

Matthew Wright petitions for a writ of habeas corpus under 28 U.S.C. § 2254, challenging on three grounds his 1993 conviction by jury for first degree murder. He is in the custody of the Washington State Department of Corrections, serving a sentence of 494 months incarceration. (Doc. 1.) The respondent filed an Answer contending that most of petitioner's grounds are unexhausted and procedurally barred, or without merit. (Doc. 10 at 6-12.)

Having considered all of the papers, documents, and portions of the record related to those issues (*see* doc. 1, 2, 10, 11, 40), including the extensive trial court transcripts, and having reviewed the remaining record, I recommend that the court deny the Petition.

II

The Court of Appeals for the State of Washington summarized the facts regarding petitioner's conviction:

> Sixteen-year-old Audra Letnes was stabbed, strangled, and her skull was crushed, resulting in her death. During the subsequent investigation, the police contacted her friend, Matthew Wright, and his friend Brandon Reynolds, as potential suspects. Reynolds was arrested on unrelated warrants. As a suspect during the first statement, he admitted picking Wright up the morning after Letnes' death, but claimed to have no knowledge of her death. After being threatened with a polygraph, Reynolds made a second statement as a witness, claiming that Wright admitted killing Letnes the morning after her death.
>
> At trial Reynolds sought to assert a privilege against self-incrimination to avoid testifying against Wright, but the trial court ruled that the privilege did not apply. [The court held an *in camera* hearing and determined that petitioner's privilege claim was unfounded. (Doc. 11, Ex. 8 at 18-23.)] Reynolds still refused to testify and was jailed for contempt. Eventually Reynolds testified, stating that he felt coerced to give the second statement to the police and to testify. The jury convicted Wright of first degree murder for Letnes' death. The trial court imposed an exceptional sentence based upon aggravating factors of multiple injuries indicating deliberate cruelty, victim vulnerability, and motive to frustrate prosecution on other charges.

(Doc. 11, Ex. 23 at 1-2, and Ex. 26 at 1 (footnotes omitted).)

Direct Appeal

Petitioner appealed to the Court of Appeals for the State of Washington, raising the following grounds:

(1) that the trial court erred in various procedural and evidentiary rulings;

(2) that the prosecutor committed misconduct several times during trial; and

(3) that the facts did not support the exceptional sentence.

(Ex. 23 at 2.) The court of appeals affirmed petitioner's conviction. (*Id.*).

Petitioner then sought discretionary review by the Supreme Court for the State of Washington, raising the following grounds:

(1) that the trial court's limitations on cross-examination of Reynolds regarding the assertion of his Fifth Amendment privilege violated petitioner's right to confrontation;

(2) that the prosecutor's reference to Reynolds being threatened with a polygraph examination was reversible error;

(3) that the admission of testimony regarding a "pending charge" of rape against petitioner violated his right to due process;

(4) that the admission of evidence of petitioner's prior assaults on the victim, without an appropriate limiting instruction, was reversible error;

(5) that the court of appeals erred in concluding that petitioner waived his challenge to

some of the hearsay evidence admitted at trial;

(6) that the admission of expert testimony on battered women's syndrome was prejudicial;

(7) that the tactics and pressure applied on Reynolds by the prosecution and the trial court violated petitioner's due process rights;

(8) that the cumulative error denied petitioner a fair trial, due process, and the right to present a defense; and

(9) that the trial court's exceptional sentence was based in part upon erroneous findings and was not supported by adequate reasons.

(Doc. 11, Ex. 27 at 7-18.) The Supreme Court for the State of Washington denied review. (*Id.*, Ex. 28.)

III

Petitioner advances three grounds for habeas corpus relief:

(1) the trial court violated his right to confrontation by restricting the scope of permissible cross-examination concerning facts alleged to demonstrate Reynolds' bias and motive to lie;

(2) the trial court violated his right to present a defense by prohibiting the introduction of evidence or argument on the pressures applied by the court on Reynolds to testify

or to discuss that he was also a suspect in the murder; and

(3) the trial court violated his right to confrontation by allowing the admission of hearsay statements from the victim.

(Doc. 1 at 5-6.) Respondent contends that petitioner's grounds are unexhausted and now procedurally barred under state law, with the exception of his first ground regarding the violation of his right to confrontation based on limits imposed on the cross-examination of Reynolds. (Doc. 10 at 6-12.)

A. Exhaustion Doctrine

The court should only consider the merits of petitioner's grounds if they are based on federal law, and have been properly exhausted by being fully and fairly presented to the Supreme Court for the State of Washington. *See* 28 U.S.C. § 2254(b)(1)(A); *Gray v. Netherland*, 518 U.S. 152, 162-163 (1996). Petitioner must provide the state's highest court with a "fair opportunity" to resolve any constitutional issues. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). Moreover, full presentment means that "[i]t is not enough that all the facts necessary to support the federal claim were before the state court[ ]"; specific formulations of the federal law claims are required, and general appeals to constitutional principles are insufficient to present the "substance" of federal claims in state courts. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *see Gray*, 518 U.S. at 163.

A petitioner only properly presents a claim to the state courts if he complies with state procedural rules.

Under Washington Rule of Appellate Procedure 13.7(b), the state supreme court "will review only the questions raised in the motion for discretionary review," and the petition for review must contain "[a] concise statement of the issues presented for review," as well as the relevant supporting arguments. RAP 13.4(c)(5), (7); RAP 10.3(a)(5). A petitioner may not "[adopt] and incorporate by reference" issues and arguments raised elsewhere. *State v. Brett*, 892 P.2d 29, 65 (Wash. 1995). Moreover, a petitioner must plead his issues with specificity. *See In re Dependency of K.S.C.*, 976 P.2d 113, 120 (Wash. 1999); *State v. Collins*, 847 P.2d 919, 924-25 (Wash. 1993).

Petitioner failed to exhaust his second (pressures applied by the court on Reynolds violated petitioner's right to present a defense) and third grounds (victim's hearsay testimony). In regards to his second ground, he raised it with the state court of appeals as a violation of his federal right to present a defense, discussing the facts and law in support of his ground at pages 101-03 of his court of appeals' opening brief (doc. 11, Ex. 20 at 101-03), but he did not specifically raise that ground with the state supreme court. Instead, he vaguely mentioned a violation of his right to due process by "the tactics and pressures applied by . . . the trial court to . . . Reynolds," (*id.*, Ex. 27 at 17), and he referenced the discussion of the ground in his court of appeals' brief under a claim of "cumulative error":

> Petitioner respectfully refers the Court to the Brief of Appellant, especially at 101-03, for authorities and argument of this specific issue. This constitutional issue should be decided by this Court. RAP 13.4(b)(3).

(*Id.*, Ex. 27 at 17-18.) Petitioner did not fully present his second ground to the state supreme court because he did not discuss the factual and legal basis for it, nor did he fairly present his ground because incorporation by reference is not allowed under state court rules. *See Kibler v. Walters*, 2000 WL 20917, at *1 (9th Cir. Jan. 14, 2000). Furthermore, in regards to his third ground, he did not properly exhaust it because he failed to specifically identify the hearsay evidence that was being challenged and did not present it as a violation of federal law. (Doc. 11, Ex. 27 at 15-16.)

Petitioner argues that he properly exhausted his grounds by referencing portions of his state court of appeals brief. (Doc. 40 at 9-18.) That argument was rejected in *Kibler*, where the court held that incorporation by reference does not amount to full and fair presentation under Washington state court rules. *See Kibler*, 2000 WL 20917, at *1.

Though petitioner vigorously contends that *Kibler* does not control because it was decided after he had completed his state appeals, his argument misses the mark. *Kibler* relied on established state court rules, and did not establish a new rule. Through both the Washington Rules of Appellate Procedure and state case law, petitioner had sufficient notice of the proper procedure to present his grounds fully and fairly.

Because petitioner failed to present his second and third grounds fully and fairly to the state supreme court, those grounds are unexhausted. He is now procedurally barred from presenting these two grounds in state court. *See* RCW 10.73.090 (providing for a one-year time bar for

state post-conviction collateral attacks). This court may only address those procedurally defaulted grounds on the merits if petitioner demonstrates cause and prejudice for the default, or if federal review is necessary to prevent a miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 748-50 (1991); *Teague v. Lane*, 489 U.S. 288, 298 (1989). To demonstrate cause, petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 479 (1986). A showing of prejudice requires the petitioner to "shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Lacking an excuse of cause and prejudice for the procedural default, federal review may still be had if the petitioner can persuade the court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995).

Petitioner has failed to excuse his default. He has neither shown prejudice nor a fundamental miscarriage of justice. He asserts as cause the state supreme court's purported practice of accepting issues for review based on incorporation of state court of appeals' briefs. (Doc. 40 at 18.) Petitioner merely seeks to accomplish through indirect means that which he cannot accomplish directly. As previously discussed, petitioner was placed on notice that he should not incorporate arguments by reference in his briefing to the state supreme court. Though petitioner

contends that the state supreme court has permitted incorporation in the past, his argument proves too much: the state supreme court certainly may address improperly briefed issues *sua sponte*, but that does not mean that it *must*.

Accordingly, petitioner's second and third grounds should be dismissed as unexhausted and procedurally barred. Respondent concedes, however, that petitioner's first ground, as it pertains to the cross-examination of Reynolds, was properly exhausted. Thus, the inquiry turns to the merits of that ground.[1]

B. Merits Standard

Petitioner contends in his first ground that his right to confrontation was violated when the trial court refused to allow him to cross-examine Reynolds about asserting his privilege against self-incrimination, and about being held in contempt for asserting that privilege.[2] (Doc. 11, Ex. 20, at 66-73.) This court cannot grant a writ of habeas corpus on petitioner's ground, unless the state court's decision rejecting it was either "contrary to, or involved

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[1] Petitioner also contends in his Reply that the court improperly limited his cross-examination of additional witnesses. (Doc. 40 at 2.) Petitioner did not exhaust that argument based on *Kibler* (*see* Doc. 11, Ex. 27 at 11), and it is now procedurally barred. The court will only address the merits of petitioner's first ground as it was presented to the state supreme court. (*See id.* at 7-11)

[2] The trial court determined that the petitioner had alternative ways to demonstrate potential bias and to demonstrate the pressure that was placed on Reynolds to testify. (*Id.*, Ex. 8 at 22-23.)

an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). *See Van Tran v. Lindsey*, 2000 WL 622070 (9th Cir. May 16, 2000) (discussing § 2254(d)(1) standard after *Williams v. Taylor*, 120 S. Ct. 1495 (2000)).

Although a defendant has the right to inquire as to a witness' bias, the Supreme Court has granted wide latitude to trial judges in setting the bounds for cross-examination. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (trial judges have "wide latitude . . . to impose reasonable limits" on the conduct of cross-examination); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (cross-examination is "[s]ubject always to the broad discretion of a trial judge"). There are no United States Supreme Court decisions that grant a criminal defendant the unfettered right to cross-examine a witness about any imaginable matter the defense deems relevant to prove bias. *See Grunewald v. United States*, 353 U.S. 391, 423-24 (1957) (finding it impermissible for purposes of impeaching a witness, questioning about a prior invocation of the privilege against self-incrimination).

Here, the trial court's limitations to the cross-examination of Reynolds did not impermissibly infringe on petitioner's right to confrontation. The trial court reasonably determined that petitioner lacked the right to inquire into Reynolds' assertion of his privilege against self-incrimination, and that any inquiry regarding that or the court's contempt order would only mislead and confuse the jury. The court also reasonably concluded that cross-examination on the issue was not necessary to inquire of Reynolds' bias because the court only compelled

Reynolds to testify; it did not compel Reynolds' particular testimony against petitioner, nor did it prohibit Reynolds' good-faith assertion of the privilege in response to particular questions. *See, e.g, United States v. Vavages*, 151 F.3d 1185, 1191 (9th Cir. 1998) (holding that a court should inquire regarding the basis for a witness' refusal to testify based on an assertion of the privilege). If there was bias to be exposed by delving into the matter of Reynolds' privilege assertion, the petitioner certainly was not denied the opportunity: the cross-examination of Reynolds demonstrated that he did not want to testify, that he felt pressured to do so by the prosecution, and that he gave a statement out of concern that he might be accountable for the murder. (Doc. 11, Ex. 9 at 70-89.) This testimony provided the petitioner with an evidentiary basis for arguing bias to the jury, and renders his right of confrontation concerns ill-founded. Given the wide latitude trial judges have in setting the bounds for cross-examination, this court cannot conclude that the trial court's determinations were unconstitutional.

The state courts' rejection of petitioner's grounds was also not "contrary to," nor was it a clearly erroneous application of, any Supreme Court decision. *See Van Tran*, 2000 WL 622070 at *6 (discussing application of the clear error standard). The state court of appeals ruled that: (1) petitioner failed to show how cross-examination of Reynolds regarding being held in contempt for his assertion of his privilege was relevant to show bias, (2) petitioner has no right to introduce evidence that a witness has invoked the privilege against self-incrimination, and (3) an assertion of privilege is not evidence from which the trier of fact may draw inferences. (Doc. 11, Ex. 23 at

4.) The court of appeals' decision does not evidence a constitutional infirmity, nor is its analysis unreasonable. The fact that trial judges have broad discretion in setting the bounds of permissible cross-examination, coupled with an absence of clear federal law entitling a defendant to delve into any conceivable topic in cross-examination, militates in favor of the conclusion that the state courts' decision rejecting petitioner's ground was consistent with, and not a clearly erroneous application of, Supreme Court law.

Accordingly, petitioner's first ground should be dismissed as without merit.

IV

For the foregoing reasons, I recommend that the court deny the petitioner's Petition for a writ of habeas corpus. The court should find that ground one is without merit, and that grounds two and three are unexhausted and procedurally barred. A proposed order accompanies this Report and Recommendation.

DATED this 11 day of July, 2000.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate
Judge

APPENDIX E

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON Respondent, v. MATTHEW B. WRIGHT, Petitioner.	NO. 65669-0 **ORDER** C/A NO. 34263-1-I (Filed Sept. 2nd, 1998)

All five members of Department II of the Court considered the matters set on its September 1, 1998, Motion Calendar, and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That the Petition for Review is denied.

I CERTIFY THAT THIS ORDER
WAS ENTERED BY THE COURT
ON THIS 2nd DAY OF
SEPTEMBER, 1998.

/s/ C.J. Merritt
C.J. MERRITT, CLERK

APPENDIX F

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, vs. MATTHEW BYRON WRIGHT, Appellant.	NO. 34263-1-I DIVISION ONE ORDER MODIFYING OPINION (Filed Feb. 27, 1998)

IT IS HEREBY ORDERED that the court's opinion in this matter filed on August 25, 1997, be, and hereby is, modified as follows:

1. At page 1, line 5 of the opinion, the fourth sentence shall be deleted in its entirety, and the following sentence is added in place of the deleted sentence:

> "As a suspect during the first statement, he admitted picking Wright up the morning after Letnes' death, but claimed to have no knowledge of her death. After being threatened with a polygraph, Reynolds made a second statement as a witness, claiming that Wright admitted killing Letnes the morning after her death."

2. On page 4, in footnote 5 of the opinion, a new sentence shall be added to the end of the footnote as follows:

> "We examine a trial court's exercise of discretion in limiting cross examination in light of a defendant's right to effective cross examination under the confrontation clause."

3. On page 4, paragraph 2, line 4 should be changed from "question him about Wright" to the words "question him about Letnes' death".

Except as herein modified, the court's opinion in this matter filed on August 25, 1997, is unchanged. Appellant's Motion for Reconsideration filed September 15, 1997, is granted to the extent reflected in this order, and is otherwise denied.

DATED this 27th day of February, 1998.

/s/ Baker, C.J.

/s/ Coleman, J.

/s/ Grosse, J.

APPENDIX G

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

/s/ William W. Baker
CHIEF JUDGE

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, vs. MATTHEW BYRON WRIGHT, Appellant.	NO. 34263-1-I DIVISION ONE **UNPUBLISHED OPINION** FILED: AUG 25 1997

BAKER, C.J. – Sixteen-year-old Audra Letnes was stabbed, strangled, and her skull was crushed, resulting in her death. During the subsequent investigation, the police contacted her friend, Matthew Wright, and his friend, Brandon Reynolds, as potential suspects. Reynolds was arrested on unrelated warrants. While in custody he gave the police two statements, the first implicating Wright in Letnes' death and, after being threatened with a polygraph, the second stating that Wright admitted killing Letnes.

At trial Reynolds sought to assert a privilege against self-incrimination to avoid testifying against Wright, but the trial court ruled that the privilege did not apply.[1] Reynolds still refused to testify and was jailed for contempt. Eventually Reynolds testified, stating that he felt coerced to give the second statement to the police and to testify. The jury convicted Wright of first degree murder for Letnes' death. The trial court imposed an exceptional sentence based upon aggravating factors of multiple injuries indicating deliberate cruelty, victim vulnerability, and motive to frustrate prosecution on other charges.

Wright appeals the conviction and exceptional sentence, arguing that (1) the trial court erred in various procedural and evidentiary rulings, (2) the State committed prosecutorial misconduct several times during trial, and (3) the facts do not support the exceptional sentence. After reviewing the record, we hold that no reversible error occurred in the trial court's procedural and evidentiary rulings, no prosecutorial misconduct occurred, and the evidence supports the exceptional sentence. Accordingly, we affirm the conviction and sentence.

This opinion has no precedential value and will be filed according to the rules of court.[2] Because this opinion will not be published and the facts are known to the parties, we address the facts only as necessary for an understanding of the opinion.

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[1] A commissioner of this court denied discretionary review of that ruling.

[2] *See* RCW 2.06.040; RAP 10.4(h).

Procedural and Evidentiary Rulings[3]

We review a trial court's decisions on motions in limine and on the admissibility of evidence for an abuse of discretion, which exists when the trial court's exercise of discretion is either manifestly unreasonable or based upon untenable grounds or reasons.[4]

A. Brandon Reynolds

Wright argues that the trial court erred by (1) excluding evidence that Reynolds was held in contempt for asserting his privilege against self-incrimination, (2) finding no prosecutorial misconduct in obtaining Reynolds' testimony, and (3) permitting testimony that the police took Reynolds to the polygraph room.

First, Wright claims that he was denied his confrontation right when the trial court refused to allow him to cross-examine Reynolds about being held in contempt for asserting his privilege against self-incrimination. Both the state and federal constitutions guarantee a defendant the right to confront witnesses through cross-examination; however, this guarantee is not absolute.[5] This right is

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[3] Because Wright challenges numerous rulings, we have grouped together the analysis of issues relating to Brandon Reynolds, Christopher McGonagle, and Audra Letnes, and have included the analysis of prosecutorial misconduct relating to Reynolds and Letnes therein.

[4] *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[5] *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (courts have wide latitude in limiting cross-examination; confrontation clause affords opportunity for effective cross-examination, not any cross-

violated if the trial court prohibits cross-examination on issues relevant to show bias or motive.[6] However, no party may introduce evidence that a witness has invoked the privilege against self-incrimination.[7] An assertion of privilege is not evidence, and the trier of fact should not be allowed to draw inferences from it.[8]

Wright failed to show how cross-examination of Reynolds about being held in contempt for his assertion of this privilege was relevant to show bias. Moreover, Wright's cross-examination elicited that Reynolds did not want to testify, felt pressured to do so by the police, and gave a statement out of concern that he himself might be held for the murder. This testimony provided Wright with a substantial evidentiary basis for arguing bias to the jury. The trial court did not abuse its discretion in limiting the cross-examination.

Second, Wright claims that the State obtained Reynolds' testimony through misconduct by engaging in the following behavior: The State arrested Reynolds on the unrelated warrants to obtain custody over him so that it could question him about Wright. When Reynolds did not give the desired statement, the State jailed Reynolds and coerced his cooperation with threats of a polygraph

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examination a defendant may wish); *State v. Young*, 89 Wn.2d 613, 628, 574 P.2d 1171 (scope of cross-examination is within discretion of trial court), *cert. denied*, 439 U.S. 870 (1978).

[6] *State v. Buss*, 76 Wn. App. 780, 788-89, 887 P.2d 920 (1995).

[7] *State v. Smith*, 74 Wn.2d 744, 758, 446 P.2d 571 (1968), *vacated in part on other grounds*, 408 U.S. 934 (1972), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

[8] *Smith*, 74 Wn.2d at 757.

and with visits from his family. The State released Reynolds after his second statement, even though the unrelated charges were not resolved. Later the State suggested that Reynolds hire an attorney, but continued to contact him directly after he obtained counsel. When Reynolds did not appear at a pretrial hearing, the State arranged his arrest on the same unrelated warrants. The State further exerted pressure on Reynolds by bringing witnesses and his family into the courtroom contrary to a court order, and by controlling the place and terms of his incarceration and transport. The State also pressured Reynolds by seeking to have his attorneys held in contempt when he refused to testify. Wright argues that these acts improperly coerced Reynolds to testify.

To prove prosecutorial misconduct, Wright must prove that the State's conduct was improper and, if improper, that a substantial likelihood exists that the misconduct affected the jury.[9] Wright has not met this burden because it was a court order, not a threat from the State, that impacted Reynolds' decision to testify. In fact, the trial court was responsible for holding Reynolds in contempt and having him jailed when he refused to cooperate after it determined that he had no Fifth Amendment privilege. Such decisions are within the province of the trial court.[10]

Moreover, Wright had no standing to challenge the State's treatment of Reynolds. And, the State's active

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[9] *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

[10] *See State v. Hobble*, 126 Wn.2d 283, 292-93, 892 P.2d 85 (1995) (decision to hold witness in contempt for refusal to testify after court order within province of trial court).

attempt to obtain testimony is not misconduct. The trial court did not err in denying Wright's motion for a mistrial based upon these allegations of prosecutorial misconduct.

Third, Wright claims that (1) the trial court erred in allowing testimony about the polygraph, in determining that a curative instruction corrected any prejudice that arose from testimony that Reynolds was taken to the polygraph room, and in refusing to grant a mistrial after this testimony, and (2) the State committed misconduct by eliciting this testimony from Reynolds. We disagree.

In Washington the results of a polygraph examination are generally inadmissible; however, "[t]he mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result is not prejudicial."[11]

Here, the reference to the polygraph was not reversible error because the testimony does not indicate that Reynolds ever took a polygraph test, nor does it indicate the results. In fact, to permit Wright to argue that Reynolds was coerced into making the second statement to the police, the court allowed the State to ask if Reynolds was threatened with a polygraph before he

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[11] *State v. Descoteaux*, 94 Wn.2d 31, 38, 614 P.2d 179 (1980) (reversing conviction because reference to polygraph tests permitted prejudicial inferences about their results; noting that no reversible error occurs when reference to polygraph test does not create inference as to the result), *overruled on other grounds in State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982); *see also State v. Sutherland*, 94 Wn.2d 527, 529-31, 617 P.2d 1010 (1980) (same).

made that statement. Limiting the reference for that purpose did not raise any prejudicial inference regarding the polygraph.

Moreover, the trial court cured any error by instructing the jury to disregard the reference to Reynolds being taken to the polygraph room. The trial court then considered Wright's motion for a mistrial for the violation of its order limiting the scope of questions about the polygraph, and ruled that any prejudice from the reference was minimal and the jury would adhere to the court's instruction to disregard it. The jury is presumed to obey the court's rulings and disregard remarks that are stricken.[12] The trial court committed no error.

The prosecutor should have instructed Reynolds about the court's order regarding the polygraph issue; however, the State's questions do not indicate an intent to elicit an improper response. Nor did the questions in fact elicit a response about the polygraph results. Wright has neither shown misconduct, nor has he shown that misconduct affected the jury.

B. Christopher McGonagle

Wright argues he was denied his confrontation right when the trial court excluded evidence that Wright claims was relevant to show witness McGonagle's bias. We disagree. First, Wright failed to object to the trial court's rulings excluding evidence of McGonagle's criminal

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[12] *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

activities with other witnesses and prohibiting the identification of his attorney. A defendant waives the right to raise evidentiary error if no objection is made at trial.[13] Second, Wright has failed to explain why the evidence was relevant to bias. Third, the trial court did not prevent Wright from thoroughly questioning McGonagle.[14] The trial court's minimal limitation of the areas about which McGonagle could be questioned was not an abuse of discretion.

C. Audra Letnes

Wright argues that the trial court erred by (1) admitting evidence under ER 404(b) of Wright's prior assaults on Letnes, (2) permitting questions regarding a rape investigation, (3) admitting Letnes' hearsay statement that Wright told her to meet him the night of her death, (4) permitting testimony on battered women's syndrome, and (5) excluding potentially exculpatory evidence about Letnes.

Wright argues that the prior assaults were inadmissible to show motive (*i.e.*, that Wright killed Letnes to prevent her from testifying against him regarding the

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[13] *State v. Kendrick*, 47 Wn. App. 620, 636, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987).

[14] The trial court permitted Wright to elicit information from McGonagle (1) about his relationships with other witnesses, but not about criminal activities that would have elicited an assertion of Fifth Amendment privilege, (2) about his immunity relating to the theft of the Subaru found near the murder scene, and (3) that his immunity agreement made him eligible for work release, but not that he was in work release.

assaults) because (1) the assaults were irrelevant to motive, (2) their probative value was outweighed by their prejudicial effect, and (3) the court gave no limiting instruction on how the jury could consider the assaults.[15]

In ruling on the admissibility of such acts, the trial court must state the purpose for which it admits the evidence and must determine whether the evidence is relevant and necessary to prove an element of the crime charged.[16] To be admissible, the evidence must be of consequence to the action and make an identified fact more probable.[17] Evidence of prior assaults is generally admissible to show motive, particularly when only circumstantial proof of guilt exists.[18]

Here, the court considered testimony that Wright allegedly assaulted Letnes numerous times. In pretrial rulings, the court determined that only those assaults which were actually witnessed were admissible to show motive; *i.e.*, that Wright had a motive to murder Letnes to prevent her from pursuing assault charges against him.[19] In so limiting the admissible evidence, the trial court weighed and minimized the prejudice of such statements.

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[15] ER 404(b) provides that other crimes or bad acts are inadmissible to show conformity therewith, but may be used to show motive.

[16] *Powell*, 126 Wn.2d at 258-59.

[17] *Powell*, 126 Wn.2d at 259.

[18] *Powell*, 126 Wn.2d at 260.

[19] *See State v. Pirtle*, 127 Wn.2d 628, 650, 904 P.2d 245 (1995) (motive to conceal crime relevant to premeditation), *cert. denied*, 116 S. Ct. 2568 (1996).

Thus the trial court did not abuse its discretion in admitting this evidence.

Wright further contends that the trial court erred by not giving a limiting instruction on the prior assault evidence. Wright did not request such an instruction. The failure to request such an instruction does not necessarily preclude review if the error was so prejudicial that a limiting instruction would not have cured it;[20] however, no prejudice exists here because Wright admitted the prior assaults and knowing that Letnes obtained a protection order against him after reporting the assaults.

Wright also argues that the testimony about the rape investigation was hearsay and the prosecutor committed misconduct by referring to that investigation. We disagree. Letnes' mother's testimony that she filed a complaint for statutory rape was not hearsay. It was direct, first-person testimony about her own actions.

In addition, while a child rape charge was legally impossible, no prosecutorial misconduct has been shown. The evidence was relevant to establish motive, and helped to explain Wright's alleged statement to Reynolds on the night of the murder that everything was okay and he would not be going to prison.

Finally, the State may draw reasonable inferences from the testimony in closing argument, as long as no

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[20] *See State v. Mack*, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971) (holding that failure to request limiting instruction did not necessarily preclude consideration of error when curative instruction would not have cured prejudice).

personal opinion is given.[21] Here, in closing the State referred to Letnes' mother filing the rape complaint and Letnes' assault report to the police, and then drew the inference that because Letnes taunted Wright with the assault complaint, she probably told him about the rape investigation. The evidence supports this argument. No prosecutorial misconduct occurred regarding the rape investigation.

Wright also argues that the hearsay testimony from Letnes' friend that Wright asked Letnes to meet him at Innis Arden Park on the evening of her death was inadmissible under ER 803(a)(3), the state of mind exception to the hearsay rule. That exception allows hearsay statements "to prove that the declarant acted in accordance with statements of future intent."[22] The portion of the testimony in which Letnes told her friend "not [to] tell anyone or write it down" was not properly within the hearsay exception. Wright failed, however, to seek any redaction of the challenged testimony. Wright thus waived the right to challenge any error in the admission of this testimony.

Wright also challenges the admission of expert testimony on battered women's syndrome. He argues that it was not helpful or necessary to the jury because no dispute existed that Letnes was willing to continue seeing Wright. Wright appears to be correct. Generally, a trial

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[21] *State v. Stover*, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), *review denied*, 120 Wn.2d 1025 (1993).

[22] *Powell*, 126 Wn.2d at 266 (citing *State v. Terrovona*, 105 Wn.2d 632, 642, 716 P.2d 295 (1986), *cert. denied*, 499 U.S. 979 (1991)).

court's decision to admit expert testimony is discretionary.[23] In determining whether to admit such testimony, the trial court must consider whether such testimony is helpful to the trier of fact.[24] Testimony is helpful if it is relevant.[25] Such testimony cannot provide either a direct or inferential opinion of guilt.[26]

Here, no dispute existed that Letnes was willing to meet Wright; in fact, the evidence established that she continuously sneaked out at night to meet him and that she threatened to kill herself if the protection order was not lifted. In addition, the expert testimony bolstered the inference that she planned to meet Wright that evening, which arose from her hearsay statement that he asked her to meet him. Because the expert testimony gave undue weight to an undisputed fact and was not helpful to the trier of fact for any other reason, its admission was error.

The erroneous admission of expert testimony is not reversible error, however, unless it impacted the outcome of the trial.[27] Because other testimony supported the

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[23] *In the Matter of the Personal Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993).

[24] *State v. Ciskie*, 110 Wn.2d 263, 271-80, 751 P.2d 1165 (1988) (holding that syndrome testimony assisted jury in understanding reasons for staying in abusive relationship).

[25] *State v. Riker*, 123 Wn.2d 351, 364-65, 869 P.2d 43 (1994) (holding that no abuse of discretion occurred because syndrome testimony not probative in duress defense).

[26] *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

[27] *See State v. Wilber*, 55 Wn. App. 294, 299, 777 P.2d 36 (1989) (erroneous admission of expert testimony not of constitutional magnitude and is not prejudicial unless it affects the outcome of trial).

inference that Letnes sneaked out to meet Wright on the night of her death, including her past history of doing so, the alarm time she set on her clock and message service, and her behavior the evening of her death, we conclude that the expert testimony did not impact the outcome of the trial. Its erroneous admission was therefore harmless.

Wright also contends that other evidence about Letnes relevant to his defense was excluded. He fails, however, to explain how the evidence is relevant to his defense. We will not resolve issues that are not supported by reasoned argument.[28]

D. Other Issues

Wright challenges the trial court's exclusion of potentially exculpatory evidence about other criminal activity near the park on the night of Letnes' death. Again, Wright fails to provide any argument about how this evidence is relevant to his case, so we need not address this argument.[29] Our review of the record indicates that the trial court did admit testimony from several witnesses about their observations of events near the park that evening, only excluding those reports relating to occurrences several blocks away. Such evidence allowed Wright to present his argument that someone else could have been involved in Letnes' death, and the limitation was not an abuse of discretion.

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[28] *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

[29] *Dennison*, 115 Wn.2d at 629.

Wright also argues that the trial court should have granted him a new trial based upon evidentiary errors and newly discovered evidence. He challenged all of the issues discussed above and argued that a new trial was necessary because Reynolds recanted his testimony.

A trial court has broad discretion in deciding a motion for new trial, which will not be overturned absent abuse.[30] Here, the trial court gave careful consideration to each of Wright's reasons justifying a new trial. In addition, the trial court determined that Reynolds' recantation at most raised a credibility issue that was resolved by the jury and was not a valid basis for a new trial because (1) he subsequently withdrew the statement, and (2) independent evidence at trial corroborated Reynolds' trial testimony.[31] We find no abuse of discretion.

Finally, Wright argues that the above errors constitute cumulative error, denying him due process and a fair trial. While the combined effect of accumulated evidentiary errors may necessitate a new trial, we have determined that most of the claimed errors were either not error or not preserved for review. The errors we have identified do not lead us to conclude that cumulative error exists.

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[30] *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

[31] At trial, Reynolds' roommate and his girlfriend both testified that Reynolds told them about Wright's confession.

Exceptional Sentence

Wright argues that sufficient evidence did not support the factual findings justifying the exceptional sentence and those factual findings were legally insufficient.[32] The trial court found that the multiple injuries indicated deliberate cruelty, that the victim's age (15) and the ongoing physically and verbally abusive relationship indicated exploitation of her vulnerability, and that Wright committed the murder in part to prevent Letnes from pursuing further charges against him, indicating an effort to frustrate a court process. The trial court also stated that it would impose an exceptional sentence for any one of the stated reasons standing alone.

We review an exceptional sentence to determine whether (1) the reasons for the sentence are supported by the record under a clearly erroneous standard, (2) the stated reasons justify an exceptional sentence as a matter of law, and (3) the trial court abused its discretion by imposing a sentence that is clearly too lenient or excessive.[33] The trial court's reasons must be based upon factors not taken into consideration in calculating the presumptive range.[34] In addition, an exceptional sentence will be upheld if any of the reasons given are valid.[35]

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[32] The standard range sentence for this crime is 281 to 374 months, but the trial court imposed an exceptional sentence of 494 months.

[33] *State v. Cardenas*, 129 Wn.2d 1, 5-6, 914 P.2d 57 (1996).

[34] *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986).

[35] *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

Here, the autopsy supported the finding of multiple injuries. The autopsy revealed that (1) the cause of death was the blow to the head with a concrete block, causing severe brain injury, (2) Letnes was strangled manually and with another device, (3) Letnes was stabbed in the neck to the depth of her breathing tube, and (4) Letnes had defensive wounds, including scratches and abrasions across her hands, fingers, right arm, right shoulder, bruises on her right arm, shoulder and knee, and lacerations around her lips, indicating that she engaged in a struggle before her death.

This evidence of multiple injuries indicates deliberate cruelty and provides an adequate basis for an exceptional sentence. The evidence also suggests that, even if Wright did not know about the rape investigation, he knew about the assault investigation and the protective order that Letnes had obtained, and he wanted Letnes out of his life. Thus the record supports the finding that the murder was committed to prevent Letnes from pursuing the charges, and that finding supports the exceptional sentence.

The evidence supporting these two factors provides an adequate legal basis for the exceptional sentence. The sentence was not clearly excessive and its imposition was not an abuse of discretion.

Affirmed.

/s/ Baker, CJ

WE CONCUR:

/s/ Grosse, J

/s/ Coleman, J

APPENDIX H

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. MATTHEW B. WRIGHT Defendant.	No. 93-1-03427-6 **JUDGMENT AND SENTENCE** (Filed Mar. 14, 1994)

I. HEARING

1.1 The defendant, the defendant's lawyer, PETE CONNICK, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

1.2 The state has moved for dismissal of count(s)____

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 12-22-93 by jury verdict of:

Count No.: I Crime: MURDER IN THE 1ST DEGREE

RCW 9A.32.030(1)(A) Crime Code 00124

Date of Crime 5-12-93 Incident No. ____

Count No.: __ Crime: _____

RCW _____ Crime Code ____
Date of Crime _____ Incident No. ____

Count No.: __ Crime: _____

RCW _____ Crime Code ____
Date of Crime _____ Incident No. ____

Additional current offenses are attached in **Appendix A**.

SPECIAL VERDICT/FINDING(S):

(a) [ ] A special verdict/finding for being armed with a deadly weapon was rendered on Count(s): _____

(b) [ ] A special verdict/finding was rendered that the defendant committed the crime(s) with a **sexual motivation** in Count(s): _____

(c) [ ] A special verdict/finding was rendered for **Violation of the Uniform Controlled Substances Act** offense taking place [ ] in a school zone [ ] in a school [ ] on a school bus [ ] in a school bus route stop zone [ ] in a public park in [ ] public transit vehicle [ ] in a public transit stop shelter in Count(s): _____

(d) [ ] **Vehicular Homicide** [ ] Violent Offense (D.W.I. and/or reckless) or [ ] Nonviolent (disregard safety of others)

(e) [ ] Current offenses **encompassing** the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

(Current offenses not listed here are not encompassed)

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a) RAPE OF CHILD	3	ADULT	931004695	KING
(b) BURG 2	5-12-89	JUV	898010277	KING
(c) ATT ROB 2	12-31-90	JUV	908060651	KING
(d) PSP 1		JUV	918004821	KING

[ ] Additional criminal history is attached in **Appendix B.**

[ ] Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)):

[ ] One point added for offense(s) committed while under community placement for count(s)_____

2.4 **SENTENCING DATA:**

	OFFENDER SCORE	SERIOUS-NESS LEVEL	RANGE	MAXIMUM TERM
Count I :	4	XIV	281-374 MONTHS	LIFE AND/ OR $50,000
Count _ :				
Count _ :				

[ ] Additional current offense sentencing data is attached in **Appendix C**.

2.4 **EXCEPTIONAL SENTENCE:**

[x] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) I

Findings of fact and conclusion(s) are attached in **Appendix D**.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

[ ] The Court DISMISSES Count(s)_____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E**.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant ot RCW 9.94A.142(2), sets forth those circumstances in attached **Appendix E**.

[ ] Restriction to be determined at future hearing on (Date) _____ at _____.m. [ ] Date to be set.
[x] Defendant waives presence at future restitution hearing(s).
60 days to give notice of hearing

Defendant shall pay $100 Victim Assessment, pursuant to RCW 7.68.035.

4.2 **OTHER FINANCIAL OBLIGATIONS:** Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $_____, Court costs; [x] Court costs are waived;

(b) [ ] $_____, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; [x] Recoupment is waived (RCW 10.01.160);

(c) [ ] $_____, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA; [ ] VUCSA fine waived (RCW 69.50.430);

(d) [ ] $_____, King County Interlocal Drug Fund; [ ] payment is waived;

(e) [ ] $_____, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(f) [ ] $_____, Incarceration costs; [x] Incarceration costs waived (9.94A.145(2));

(g) [ ] $_____, Other cost for: _____

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** IS: $100.00. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:
[ ] Not less than $_____ per month; [ ] On a schedule established by the defendant's Community Corrections Officer. [ ] _____
The defendant shall remain under the Court's jurisdiction and the supervison of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

4.2 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [x] immediately; [ ] (Date): _____ by _____.m.

494 months/days on Count No. I

_____ months/days on Count No. _____

_____ months/days on Count No. _____

The terms in Count(s) No._____ are concurrent/consecutive[.] The sentence herein shall run ~~concurrently~~/consecutively with the sentence in cause number(s) 93-1-00469-5 but consecutive to any other cause not referred to in this Judgment.

Credit is given for [ ] days served [ ] days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.95A.120(13).

4.3 [x] **NO CONTACT:** For the maximum term of Life years, defendant shall have no contact with Coral Letnes, any witnesses connected to this case **Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.**

4.4 **BLOOD TESTING:** (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) **Appendix G** is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.5 **COMMUNITY PLACEMENT:** Community Placement is ordered for sex offense, serious violent offense, second degree assault, deadly weapon finding, Chapter 69.50 or 69.52 RCW offense, and standard mandatory conditions are ordered. Community placement is ordered for the maximum period of time provided by law. [ ] **Appendix H** (for additional conditions) is attached and incorporated by reference in this Judgment and Sentence.

4.6 [ ] **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp and is likely to qualify under Sec. 4(3), Chap. 338, Laws of 1993 and the Court recommends that the defendant serve the sentence at a work ethic camp. If the defendant successfully completes the program, the Department of Corrections shall convert the period of work ethic camp confinement at the rate of one day of work ethic camp confinement to three days of total standard confinement. Upon completion of the work ethic camp program, the defendant shall be released on community custody for any remaining time of total confinement.

4.7 [ ] **SEX OFFENDER REGISTRATION** (sex offender crime conviction): **Appendix J** is attached and incorporated by reference into this Judgment and Sentence.

4.8 [ ] **OTHER:** _____

_____

_____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 3-11-94

Presented by:
/s/ Bruce Miyake
Deputy Prosecuting Attorney,
Office WSBA ID #91002

/s/ Bobbe J. Bridge
Judge, King County Superior Court
Approved as to form:

/s/ Peter T. Connick
Attorney for Defendant, WSBA #12560

[Fingerprints Omitted In Printing]

RIGHT HAND
FINGERPRINTS OF:
MATTHEW B WRIGHT

DATED: 3/11/94

/s/ Bobbe J. Bridge
JUDGE, KING COUNTY
SUPERIOR COURT

DEFENDANT'S SIGNATURE:
/s/ Matthew Wright
DEFENDANT'S ADDRESS: _____

_____

ATTESTED BY:
M. JANICE MICHELS, SUPERIOR COURT CLERK
BY: /s/ Steve Lipton
DEPUTY CLERK

CERTIFICATE OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE JUDGMENT AND SENTENCE IN THIS ACTION ON RECORD IN MY OFFICE.

DATED: _____

_____
CLERK

BY: _____
DEPUTY CLERK
S.I.D. NO. WA14437328

DATE OF BIRTH: SEPTEMBER 29, 1973

SEX: M

RACE: WHITE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. MATTHEW B. WRIGHT Defendant.	No. 93-1-03427-6 **APPENDIX G ORDER FOR BLOOD TESTING AND COUNSELING**

(1) [ ] **HIV TESTING AND COUNSELING:**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

(2) [X] **DNA IDENTIFICATION:**

(Required for defendant convicted of sexual offense or violent offense. RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA identification analysis. The defendant, if out of

custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m and 1:00 p.m., to make arrangement for the test to be conducted within 15 days.

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date: 3/11/94

/s/ Bobbe J. Bridge
Judge, King County
Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
Plaintiff,)
v.)
MATTHEW B. WRIGHT)
Defendant.)

No. 93-1-03427-6

APPENDIX H
COMMUNITY PLACEMENT

The Court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a

serious violent offense comitted [sic] after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement:

(1) Report to and be available for contact with the assigned community corrections officer as directed;

(2) Work at Department of Corrections-approved education, employment, and/or community service;

(3) Not consume controlled substances except pursuant to lawfully issued prescriptions;

(4) While in community custody not unlawfully possess controlled substances; and

(5) Pay community placement fees as determined by the Department of Corrections.

(6) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision or both. (RCW 9.94A.120(13))

WAIVER: The following above-listed mandatory conditions are waived by the court: ____

(b) [ ] **OFF-LIMITS ORDER (SODA):** The Court finds that the defendant is a known drug trafficker as defined in RCW 10.66.010(3) who has been associated with drug trafficking in an area described in Attachment A. Attachment A is incorporated by reference into the Judgment and Sentence and the Court also finds that the area described in Attachment A is a Protected Against Drug Trafficking area (PADT). As a condition of community placement, the defendant shall neither enter nor remain in the PADT area described in Attachment A. ____

(c) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement: upon release obtain a mental health/anger management evaluation and follow all recommendations as approved and directed by DOC.

Date: 3/11/94
APPENDIX H – COMMUNITY PLACEMENT

/s/ Bobbe J. Bridge
Judge, King County
Superior Court

APPENDIX I

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MATTHEW BYRON WRIGHT, Petitioner-Appellant, v. WILLIE DAIGLE, Superintendent, Washington State Reformatory, Respondent-Appellee.	No. 01-35227 D.C. No. CV-99-1400-Z ORDER (Filed Jan. 24, 2002)

Before: O'SCANNLAIN, GRABER, and McKEOWN, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX J

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. MATTHEW B. WRIGHT, Defendant.	NO. 93-1-03427-6 DECLARATION OF WITNESS BRANDON J. REYNOLDS (Filed Nov. 5, 1993)

I, BRANDON J. REYNOLDS, hereby declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am a material witness in the above-entitled matter and am currently found to be in contempt of court.

2. I wish to purge this contempt by agreeing to comply with any and all Court Orders to testify. I hereby agree to comply with all Court Orders to testify in this matter.

3. In regard to Fifth Amendment issues that have or may arise in regard to my testimony, it is my understanding that:

a. In regard to what has been referred to as the "harassment" phone call I made to the victim in about March, 1993, it is my understanding that charges against me for that incident have been dismissed with prejudice, and that I will not in any way

be subjected to any criminal liability for that incident. The prosecutor has assured me, through counsel, that they will clarify this on the record in court.

b. In regard to my taped statements to Detective Peterson on May 16 and May 17, 1993, I have been informed, through counsel, that the prosecutor will move to compel my testimony in regard to the making of the statements, pursuant to CrR 6.14, and that I will not be subjected to any criminal liability for knowingly making any false statements during those two interviews.

c. In regard to questions relating to my conversations with the defendant about the murder in question in this case, including general discussions about killing prior to commission of the murder, and my contact and conversations [BR] with the defendant after the murder, I realize and understand that this Court has ruled that I have no Fifth Amendment privilege against self-incrimination in responding to these questions, and that I have been compelled by the Court to answer these questions. I currently am in contempt of court for refusing to do so and now wish to purge that contempt and comply with this Court's Order. I do not, however, wish to waive the Fifth Amendment rights that I have been advised by counsel that I have, but I am complying with the Court's Order in order to purge this contempt.

d. In regard to any questions regarding any other criminal behavior I may have been involved in, including allegations that I was involved in a "hit and run" incident, any conduct involving alleged use of controlled substances, and any conduct involving any other acts of violence or assaultive behavior, it is my understanding that this Court has granted the State's motion *in limine* regarding these matters so that this Court has ruled that I will not be questioned

about these matters. If questioning into these areas does occur, I will ask that this Court consider at that time my Fifth Amendment right protecting me from self-incrimination.

4. I make this declaration freely and voluntarily, of my own accord, after consultation and advice of counsel.

DATED this 5th day of November, 1993.

/s/ Brandon J. Reynolds
BRANDON J. REYNOLDS

APPENDIX K

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. MATTHEW B. WRIGHT, Defendant.	NO. 93-1-03427-6 SUPPLEMENTAL DECLARATION OF WITNESS BRANDON J. REYNOLDS (Filed Dec. 13, 1993)

I, BRANDON J. REYNOLDS, hereby declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am a material witness in the above-entitled matter and was previously found to be in contempt of court for refusing to answer certain questions in this matter. This contempt was purged on November 5, 1993, after I filed in this matter a written Declaration, dated November 5, 1993.

2. I remain willing to cooperate in this matter and I still agree to comply with all Court Orders to testify in this matter.

3. In regard to Fifth Amendment issues that have or may arise in regard to my testimony, I wish to further clarify the basis of my agreement to comply with the Court's Order compelling me to testify.

4. I have previously asserted a Fifth Amendment privilege against self-incrimination in regard to questions relating to the subject matters described in Paragraphs 3.a. through 3.d. of my written Declaration, dated November 5, 1993, referred to above, because of concern that testimony related to these subject matters would be used against me if I were ever later prosecuted for any alleged involvement (either as principal, accomplice, or co-conspirator) in the murder that is the subject of this trial. I realize and understand that this Court has ruled that I have no Fifth Amendment privilege against self-incrimination in responding to these questions, and that I have been compelled by this Court to answer these questions.

5. By agreeing to comply with this Court's Order to testify, I do not wish to waive any Fifth Amendment rights I may have and have attempted to assert in these proceedings, specifically in regard to the anticipated testimony referred to in Paragraph 4., *supra*.

6. I make this declaration freely and voluntarily, after consultation and advice of counsel.

DATED this 9th day of ~~November~~ December, 1993.

/s/ Brandon J. Reynolds
BRANDON J. REYNOLDS